No. 86-5538

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ROBERT C. BOBB, EDWARD J. COOPER, and CITY OF SANTA ANA,

Petitioners,

vs.

MICHAEL OSTLUND,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KINKLE, RODIGER & SPRIGGS
A. J. PYKA
GAYLE K. TONON
837 North Ross Street
P.O. Box 1558
Santa Ana, California 92702
(714) 835-9011
Counsel for Petitioners

Publishing and Graphic Electronic Services, Inc. (PAGES) / (213) 474-7855

QUESTIONS PRESENTED

1. Whether City Officials who neglect to hold a hearing for an allegedly disabled police officer claiming disability retirement benefits, can be denied qualified immunity as a matter of law when: (1) The police officer after having been advised of the denial of his disability retirement benefits never requests a hearing, (2) No California court had held that a police officer in respondent's position had a due process right to a hearing on the denial of disability retirement benefits, and (3) No federal court had addressed the issue.

2. Whether due process is waived when a police officer having been notified of the denial of disability retirement benefits fails to request a hearing on the subject.

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TABLE OF AUTHORITIES

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

ROBERT C. BOBB, EDWARD J. COOPER and CITY OF SANTA ANA, the Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on August 21, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 825 F.2d 1371 (9th Cir. 1987) and is printed in Appendix A hereto, infra, page A3. The judgment of the United States Court of Appeals of the Ninth Circuit is printed in Appendix A hereto, infra, page A9.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A, infra, page A9) was entered on August 21, 1987. The jurisdiction of the Supreme Court is invoked under 28 USCS Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

Respondent Michael Ostlund was a police officer employed by the City of Santa Ana. Following two shooting incidents and a review thereof, the City of Santa Ana on May 6, 1983 gave Ostlund notice of its intention to terminate him by reason of a psychological condition which affected his performance of duty as a police officer. As a result of the concern over being fired, Ostlund filed an application for a service connected disability retirement with the Public Employees Retirement System (hereinafter "PERS"). Under California law, the entitlement to a disability retirement through PERS is determined not by PERS but by the employing agency (the City of Santa Ana). On June 8, 1983 Ostlund was terminated by the City of Santa Ana. That discharge was subsequently upheld following an administrative hearing before the Personnel Board of the City of Santa Ana.

On September 16, 1983, Ostlund filed in the Orange County Superior Court an Application for a Writ of Mandamus requiring the City to give him a due process administrative hearing on his entitlement to a disability retirement. One month later Ostlund dismissed his Petition for Writ of Mandate.

On July 5, 1984, the Santa Ana City Manager, Robert C. Bobb, notified both PERS and Ostlund that the City had determined that Ostlund, while disabled for police work with the City of Santa Ana, was not disabled for police work for any other governmental agency, and was not, therefore, permanently disabled so as to entitle him to a disability retirement. Based on

this determination, PERS has not granted the disability retirement.

In response to the City's denial of Ostlund's request for disability retirement benefits, Ostlund, through counsel, wrote the City a letter wherein the denial of disability benefits was vigorously protested. However, instead of demanding a hearing, Ostlund's counsel threatened suit for damages, and in fact, filed an action for deprivation of civil rights under 42 USC Section 1983 on August 10, 1984.

On November 6, 1985, the District Court, at the pre-trial conference hearing, dismissed the action on the grounds that a due process hearing was never demanded by Ostlund. The District Court further ruled that Ostlund was entitled to a due process hearing upon demand.

The District Court also ruled that the individual defendants, City Manager Robert Bobb, and City Attorney Edward Cooper, were entitled to be dismissed by reason of the qualified immunity doctrine of *Harlow v. Fitzgerald*, 457 US 800 (1982). The District Court found that there were no appellate cases, state or federal which held that a city's determination that a police officer is not entitled to retirement benefits through PERS is subject to a due process hearing. The District Court stated that the qualified immunity doctrine was applicable in a situation where the contention was that the failure to give a hearing violated due process, citing the case of *Mims v. Board of Education* 523 F.2d 711 (7th Cir. 1975).

The Court of Appeals reversed and remanded, stating the facts of the case did not support the assertion that Ostlund knowingly and voluntarily

waived his right to a hearing. Moreover, the court stated that although no federal or state court and specifically held that a police officer in Ostlund's position had a due process right to a hearing on the denial of disability retirement, the failure of City officials to insure that Ostlund knowingly and voluntarily waived his right to a hearing constituted unlawful conduct that should have been apparent to them in light of pre-existing case law. The court of appeals ruled that City officials Bobb and Cooper were not entitled to qualified immunity.

REASONS FOR GRANTING THE WRIT

The opinion of the court of appeals is in severe conflict with the Supreme Court decision in *Harlow, supra,* and with other circuit court decisions regarding the issue of qualified immunity. The opinion of the court of appeals goes too far. The opinion suggests that it is "bad faith" for a City official to fail to insure that a due process hearing occurs when no reported case law requires any such hearing. The City had at the time no administrative mechanism through which a hearing could be held, and the City employee never requested any such hearing. Thus, the court of appeals requires, under these circumstances, the defendant public employees to assume Ostlund wanted a hearing, advise Ostlund of his right to a hearing, create an administrative mechanism through which the hearing would be constitutionally required despite the fact that no court had ever so ruled.

Harlow holds that government officials are shielded from liability unless their conduct violates "clearly established statutory or constitutional rights of which a

reasonable person would have known." In the circumstances of this case, the absence of case law strongly suggests that Ostlund's rights, under the circumstances, were not established, let alone "clearly established." If the law at the time is not clearly established, an official cannot be reasonably expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

In this case the court of appeals has in effect said that City Officials should have known that they were violating Ostlund's constitutional rights when they failed to assume that Ostlund actually desired a hearing rather than proceeding with a lawsuit for damages. Ostlund never requested a hearing. Indeed, it appears it was the desire of Ostlund and his attorney to proceed with a lawsuit for monetary damages as opposed to obtaining a hearing. The reason being, the lawsuit is potentially much more rewarding financially than the hearing itself. Thus, there is a strong inference that what Ostlund wanted was not a hearing but a lawsuit.

The court of appeals has required that the City officials, to be in good faith, must have assumed that despite no existing administrative mechanism through which a hearing could have been requested or held that they were obligated to create such a mechanism and make it immediately available to Ostlund.

The court of appeals has required that City officials preduct subsequent legal developments when there is an absence of case law which would dictate their conduct.

The court of appeals ruling is entirely inconsistent with the holding of *Davis v. Scherer* 104 S.Ct. 3012 (1984). Davis was denied a hearing regarding his discharge despite the fact that such denial violated clearly settled applicable state law. Moreover, at the time this court's prior due process precedents had established that some kind of hearing was required where property interests might be at stake. Nevertheless, in *Davis*, this court held that those precedents did not deal with "minimally acceptable procedures for termination of employment" and that a defendant who otherwise passes the *Harlow* qualified immunity test regarding clearly settled constitutional law does not lose his qualified immunity for violating clearly settled state law. Moreover, the *Davis* case involved the defendants' violation of their own personal regulations. In the case herein, there is no state law on point and there were no regulations of the appellant which were violated. Thus, the court of appeals ruling herein is in direct conflict with *Davis*.

Finally, the court of appeals has overreached by virtue of its conclusion that City officials Bobb and Cooper are not entitled to good faith immunity as a matter of law. The district court found that these government officials were entitled to good faith immunity as a matter of law. At a minimum, it would seem that the government officials should have an opportunity to present their complete evidence in a trial regarding good faith immunity so that they themselves are not denied due process. For example, defendant Bobb, the City Manager, has not as of this time had the opportunity to present evidence that he relied upon and followed advice of counsel and was completely unfamiliar with the law. It would seem that

a more appropriate ruling would have been to remand the case for a full hearing on the issue of qualified immunity so that all parties could have their "day in court" on this issue. Thus, unless reasonable persons could not differ as to the breach of the qualified immunity standard of care, this question would be for the jury.

The court of appeals ruling regarding the waiver issue also appears to be a situation of having gone too far in that a full hearing on the merits would allow for all evidence to be heard on the issue. For example, evidence regarding whether or not Ostlund knew that he had a constitutional right to a hearing would be extremely probative on the issue of whether or not his waiver was knowing and voluntary. We know that Ostlund had an attorney at the time his request for retirement benefits were denied which makes the court of appeals statement that waiver was not knowing and voluntary even more suspect.

In this case, the district court has ruled as a matter of law that Ostlund waived his right to a due process hearing. The court of appeals has ruled as a matter of law that Ostlund did not waive his right to a due process hearing. This is an issue which should be subject to a full hearing so all evidence can be heard by the trier of fact.

CONCLUSION

WHEREFORE, petitioners pray that a writ of certiorari issue from this honorable court to review the judgment of the United States Court of Appeals for the Ninth Circuit. In the event that the petition is granted,

petitioners pray that the judgment of the court below be reversed.

DATED: November 10, 1987

Respectfully submitted,
KINKLE, RODIGER & SPRIGGS

A. J. PYKA
837 North Ross Street
P. O. Box 1558
Santa Ana, California 92702
Attorneys for Petitioners

APPENDIX A

The Opinion of the United States Court of Appeals For the Ninth Circuit

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL OSTLUND, *Plaintiff-Appellant,* v. ROBERT C. BOBB, EDWARD J. COOPER, CITY OF SANTA ANA, *Defendants-Appellees.*	No. 86-5538 D.C. No. CV-84-5928-HLH OPINION

Argued and Submitted
May 6, 1987—Pasadena, California

Filed August 21, 1987

Before: Harry Pregerson, Dorothy W. Nelson and Charles Wiggins, Circuit Judges.

Opinion by Judge Pregerson

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

SUMMARY

Public Employees/Civil Rights

Appeal from dismissal of action. Reversed and remanded.

Appellant Ostlund, a police officer, was notified that appellee the City of Santa Ana, California intended to discharge him because he had been found to possess an emotional or

mental condition which might adversely affect his exercise of the powers of a peace officer. After denying Ostlund's application for disability retirement, the City discharged him. Ostlund filed this action alleging that the City had violated his due process rights by refusing to hold an evidentiary hearing regarding his disability claim.

[1] The due process right of a police officer in Ostlund's position to a hearing to determine entitlement to disability retirement has been recognized explicitly by the California Court of Appeal. [2] Unquestionably Ostlund had a property interest in his disability retirement benefits and had a due process right to a hearing regarding his entitlement to such benefits. [3] The facts in this case do not support the assertion that Ostlund knowingly waived his right to a hearing. In fact, the City had established no administrative mechanism through which a hearing could be requested or held.

[4] The individual appellees cannot use the absence of case law directly on point to shield them from liability because the unlawfulness of their conduct should have been apparent to them in light of preexisting case law. [5] It was clear that Ostlund's due process rights included a right to some form of hearing. [6] No authority supported the contention that Ostlund's failure to request a hearing constituted a waiver of the right to a hearing that comported with the requirements of due process.

COUNSEL

Seth J. Kelsey, Santa Ana, California, for the appellant.

A. J. Pyka, Santa Ana, California, for the appellees.

OPINION

PREGERSON, Circuit Judge:

OVERVIEW

Appellant Michael Ostlund appeals an adverse ruling in his civil rights action. He asserts that the City of Santa Ana, California and its officials, Robert Bobb and Edward Cooper, violated his constitutional right to due process by not providing him with a hearing regarding the City's denial of his claim for disability retirement benefits. The district court dismissed the action after conducting a pretrial conference. In dismissing the action the court ruled that the City was not required to grant Ostlund a hearing because he had not requested one. The court also ruled that Bobb and Cooper were entitled to qualified immunity. We reverse and remand.

BACKGROUND

Appellant Ostlund was employed as a police officer by the City of Santa Ana, California ("the City") between 1980 and 1983. On May 6, 1983, after Ostlund had been involved in two shooting incidents and had undergone a psychiatric examination, the City notified him that it intended to discharge him because he had been "found to possess an emotional or mental condition which might adversely affect [his] exercise of the powers of a peace officer."

On May 10, 1983, Ostlund applied for disability retirement from the Public Employee's Retirement System ("PERS") and for worker's compensation from the California Worker's Compensation Appeals Board ("WCAB").

On June 8, 1983, the City discharged Ostlund. On September 12, 1983, September 29, 1983, February 13, 1984, February 22, 1984, and February 23, 1984, the Personnel Board of the City of Santa Ana held hearings on Ostlund's appeal from

his discharge. The Board upheld the City's decision to discharge Ostlund.

Meanwhile, on September 16, 1983, Ostlund petitioned the Orange County Superior Court for a writ of mandamus to compel the City to provide him with a due process hearing on his application for disability retirement. The City took the position that it was not required to hold a hearing, but conceded that Ostlund was "substantially incapacitated for the performance of his police officer duties." However, the City also asserted that Ostlund's disability was not job related and, therefore, he was not entitled to disability retirement.

Ostlund then dismissed his petition for writ of mandamus and filed a proceeding with the WCAB to determine whether his disability was in fact job related. In June 1984, the WCAB found that Ostlund's disability was job related. Ostlund notified PERS of the WCAB finding. The City's admission that Ostlund was incapacitated together with the WCAB finding that his incapacity was job related qualified Ostlund for disability retirement.

At this point the City changed its course. Citing purportedly newly discovered evidence in the WCAB proceedings, city manager Robert Bobb notified PERS that the City had determined that Ostlund was not incapacitated and therefore not entitled to disability retirement. Bobb contended that the WCAB report established "that Mr. Ostlund is able to perform the usual duties of a police officer but, because of alleged personality conflicts with supervisors in the Santa Ana Police Department, he is somehow not able to function as a police officer for the Santa Ana Police Department."

Under California law, the local governing body, in this case the City, determines disability. Therefore, PERS accepted the City's determination that Ostlund was not disabled.

On July 18, 1984, Ostlund's attorney wrote to city manager Bobb, requesting that Bobb reconsider his determination that

Ostlund was not incapacitated and threatening to sue the City if it refused to do so.

On August 8, 1984, Ostlund filed this action against City Manager Bobb, Santa Ana City Attorney Cooper, and the City of Santa Ana. Ostlund alleged violations of 42 U.S.C. §§ 1983, 1985(3), and 1986 on the ground that the City had violated his due process rights by refusing to hold an evidentiary hearing regarding his disability claim.

The district court dismissed the action after pretrial conference. The court held (1) that sections 1985 and 1986 were not applicable; (2) that Bobb and Cooper were entitled to have the cases against them dismissed on the ground of qualified immunity; and (3) that Ostlund was not entitled to relief against the City of Santa Ana because he never requested a hearing regarding his disability retirement. Ostlund only appeals the dismissal of his section 1983 claim.

STANDARD OF REVIEW

This court reviews de novo a district court's determinations on questions of law and on mixed questions of fact and law. *LaDuke v. Nelson*, 762 F.2d 1318, 1322 (9th Cir. 1985), *modified*, 796 F.2d 309 (1986).

ANALYSIS

1. *Ostlund's Right to a Hearing*

Ostlund contends that the City violated his constitutional right to due process by not providing him with a hearing on his application for disability retirement. The City contends that Ostlund waived his right to a hearing by not requesting one after the City made its final determination that he was not incapacitated.

[1] Appellees now acknowledge that Ostlund had a due process right to a hearing. Section 21022 of the California Gov-

ernment Code provides that any "local safety member incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability." Section 21022 clearly gives city police officers a vested right to disability retirement if they suffer a work-related disability. The due process right of a police officer in Ostlund's position to a hearing to determine entitlement to disability retirement was recognized explicitly by the California Court of Appeal in *Watkins v. City of Santa Ana*, 189 Cal. App. 3d 393, 234 Cal. Rptr. 406, 408 (1987). There the court stated:

> Police officers and other public employees have a vested contractual right to a reasonable disability retirement pension . . . . Here, Watkins had a fundamental vested right to disability retirement benefits if, in fact, he was disabled. The city's decision on that threshold question substantially affects that right . . . . It must therefore hold an evidentiary hearing to determine whether Watkins is capable of performing his duties.

Id. (citations omitted).

[2] Whether deprivation of a property right implicates a due process right to a hearing is a matter of federal constitutional law. *See Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1314 (9th Cir. 1984). However, "[p]roperty rights are created 'and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.' " *Kerley Indus., Inc. v. Pima County*, 785 F.2d 1444, 1446 (9th Cir. 1986) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Unquestionably Ostlund had a property interest in his disability retirement benefits and had a due process right to a hearing regarding his entitlement to such benefits.

[3] The critical question before us is whether Ostlund waived his right to a hearing by not demanding one after the City had determined that he was not incapacitated. A waiver of a constitutional right is "not to be implied and is not lightly to be found." *United States v. Provencio*, 554 F.2d 361, 363 (9th Cir. 1977). Waiver of a constitutional right must be knowing and voluntary. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Correa v. Nampa School Dist.*, 645 F.2d 814, 816-17 (9th Cir. 1981). The facts in this case do not support the assertion that Ostlund knowingly waived his right to a hearing. The district court did not make a finding that Ostlund was aware that he was entitled to a hearing, and the City never informed Ostlund that he was entitled to a hearing. In fact, the City had established no administrative mechanism through which a hearing could be requested or held. Under these circumstances, the fact that Ostlund did not demand a hearing cannot be construed as a waiver of his right to one. *Cf. Correa v. Nampa School Dist.*, 645 F.2d at 817 (Petitioner waived her due process right to a hearing based on the fact that she knew of, and chose to forego, the administrative procedures.).

Ostlund had a right to a hearing regarding his entitlement to disability retirement benefits. His failure to demand a hearing did not constitute a waiver of that right. Therefore, the City violated Ostlund's right to due process by not holding a hearing.

II. *Qualified Immunity*

Qualified immunity shields government officials from liability for damages arising from discretionary actions if the conduct of the officials "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Kirkpatrick v. City of Los Angeles*, 803 F.2d 485, 490 (9th Cir. 1986); *Lowe v. City of Monrovia*, 775 F.2d 998, 1011 (9th Cir. 1985), *modified*, 784 F.2d 1407 (9th Cir. 1986).

This standard does not require specific binding precedent to show that a right is clearly established. "[I]n the absence of binding precedent, a court should look at all available decisional law . . . to determine whether the right was clearly established." *Ward v. County of San Diego,* 791 F.2d 1329, 1332 (9th Cir. 1986). Government officials, however, are not " 'charged with predicting the future course of constitutional law.' " *Bilbrey by Bilbrey v. Brown,* 738 F.2d 1462, 1465 (9th Cir. 1984) (quoting *Wood v. Strickland,* 420 U.S. 308, 322 (1975)).

[4] When the City of Santa Ana and its officials failed to hold a hearing regarding Ostlund's entitlement to disability retirement benefits, no court in this Circuit and no California court had, in a reported decision, specifically held that a police officer in Ostlund's position had a due process right to a hearing on the denial of disability retirement. The California Court of Appeal's decision in *Watkins v. City of Santa Ana,* 189 Cal. App. 3d 393, 234 Cal. Rptr. 406 (1987) was not announced until February of 1987 — almost three years after Ostlund first filed his case in district court. However, well established principles of law dictated the California Court of Appeal's conclusion in *Watkins.* These principles also clearly support Ostlund's assertion that he had a due process right to a hearing. Therefore, Bobb and Cooper cannot use the absence of case law directly on point to shield them from liability. The unlawfulness of their conduct should have been apparent to them in light of preexisting case law. *See Anderson v. Creighton,* 107 S. Ct. 3034 (1987).

[5] Before Ostlund's discharge, California courts had clearly established that a disabled police officer had a vested contractual right to a disability retirement. *Frank v. Board of Admin.,* 56 Cal. App. 3d 236, 243, 128 Cal. Rptr. 378, 383 (1976) ("When plaintiff entered into service of the state, he was entitled by statute to industrial disability retirement benefits for job related disability regardless of *age or service* . . . ."); *Quintana v. Board of Admin.,* 54 Cal. App. 3d 1018,

1023, 127 Cal. Rptr. 11, 14 (1976) (A Califc ıia highway patrolman has a fundamental vested right to a disability retirement pension if he in fact was disabled.). It was equally clear that an officer's "property interest" in disability retirement benefits entitled the officer to the protections afforded by procedural due process. *See Orloff v. Cleland*, 708 F.2d 372, 379 (9th Cir. 1983); *Skelly v. State Personnel Board*, 15 Cal. 3d 194, 206-07, 124 Cal. Rptr. 14, 22-23, 539 P.2d 774, 782-83 (1975); *see also Goldberg v. Kelly*, 397 U.S. 254, 261 (1970). Finally, it was also clearly established that Ostlund's due process rights included a right to "some form of hearing." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Ong v. Tovey*, 552 F.2d 305, 307 (9th Cir. 1977).

[6] At the time Bobb and Cooper allegedly acted to deprive Ostlund of his disability retirement benefits, he had a right to a hearing regarding his entitlement to disability retirement — a right that was clearly established within the meaning of *Harlow v. Fitzgerald*. No authority supported the contention that Ostlund's failure to request a hearing constituted a waiver of the right to a hearing that comported with the requirements of due process. Therefore, Bobb and Cooper are not entitled to qualified immunity. *See McIntosh v. Weinberger*, 810 F.2d 1411, 1432-34 (8th Cir. 1987) (finding a property interest in equal employment opportunity claims "clearly established" on the basis of the United States Supreme Court's holding in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) that a cause of action is a species of property protected by the fourteenth amendment's due process clause).

The judgment of the district court is REVERSED and REMANDED.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on November 10, 1987, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

Seth J. Kelsey, Esq.
Attorney at Law
P. O. Box 3189
1314 West Fifth Street
Santa Ana, CA 92703
(3 Copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 10, 1987, at Los Angeles, California.

Claude A. Lagardere
(Original signed)